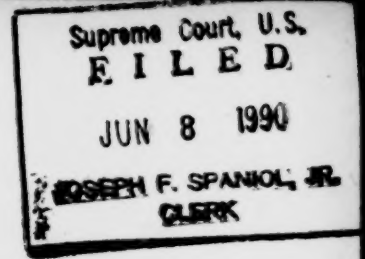


89-1968



No.

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1989

FLOYD ROBERTS,

Petitioner,

v.

STATE OF OHIO,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE OHIO SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

DEBORAH PURCELL GOSHIEN
Deborah Purcell Goshien Co., L.P.A.
The Illuminating Building
Suite 1325
55 Public Square
Cleveland, Ohio 44113
Telephone: (216) 621-5435

Attorney for Petitioner



QUESTIONS PRESENTED FOR REVIEW

1. Whether a defendant who has not been charged with any crime and who has previously provided a 20-sample handwriting exemplar to the United States Secret Service in regard to the same matters and whose identity is not in question, should be forced to give a second additional exemplar regarding the same matter with no ability to appeal such Order; i.e., Is it a valid exercise of police power to be able to compel a second handwriting exemplar through an ex-parte Order before a party has been charged with a crime when such Order is not reviewable on appeal for lack of finality?

2. Whether a coercive Court Order ordering defendant to submit to a second handwriting exemplar, signed by a sitting

judge, but not docketed or filed, is an enforceable Order such that a defendant must submit to its directive?

PARTIES

The Petitioner to this action is:

Floyd Roberts

**Address: 3209 W. 92nd Street
Cleveland, Ohio 44102**

The Respondent to this action is:

State of Ohio

**Address: c/o William Caine
Assistant Prosecutor
Justice Center - 9th Floor
1200 Ontario Street
Cleveland, Ohio 44113**

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**REFERENCE TO OFFICIAL AND UNOFFICIAL
REPORTS**

No reports of opinions have been delivered, either official or unofficial.

GROUND ON WHICH JURISDICTION IS INVOKED

The Ohio Supreme Court refused to grant Petitioner's motion for leave to appeal from the Court of Appeals for Cuyahoga County, and Petitioner's claimed appeal as of right. The Ohio Supreme Court dismissed Petitioner's appeal sua sponte on March 14, 1990.

The jurisdiction of this Court to review the opinion and judgment of the Ohio Supreme Court is invoked under 28 U.S.C. Sec. 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment IV:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Constitution of the United States, Amendment V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

CONSTITUTIONAL PROVISIONS INVOLVED
(continued)

Constitution of the United States,
Amendment XIV:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the

CONSTITUTIONAL PROVISIONS INVOLVED
(continued)

whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

STATEMENT OF THE CASE

On September 7, 1989, an ex-parte Order was hand delivered to Petitioner, Floyd Roberts, by the U.S. Secret Service, ordering Floyd Roberts to submit to a handwriting exemplar to be given to the U.S. Secret Service. The Order was signed by a Cuyahoga County, Ohio Common Pleas Court Judge, and was not time-stamped by the Clerk, nor was it docketed.

Petitioner, who had not been charged with any crime, filed a Motion to Vacate on September 12, 1989, with Affidavit, the grounds being that the matter is moot because he had previously given a handwriting exemplar consisting of 20 samples to the U.S. Secret Service and at their direction on or about August 28, 1989. Petitioner also had previously admitted

to the U.S. Secret Service that he had been one of the endorsers on the check, and therefore his identification was not in issue.

With no prior notice of the Prosecutor's response, nor opportunity for hearing, Petitioner, Floyd Roberts, was then served with a second ex-parte Order, personally and again by the U.S. Secret Service on September 14, 1989, even though he was then represented by counsel, and the Order was undated and with no case number. The second Order overruled Petitioner's Motion to Vacate, stating that the ruling was based upon a "Supplemental Affidavit" of the Prosecutor and "for good cause shown".

The second ex-parte Order directed Floyd Roberts to furnish a handwriting exemplar to the U.S. Secret Service and stated that the original Order remains in

effect, but referred to a September 6, 1989 Order, of which Petitioner has no knowledge and has been unable to find.

No Court file exists.

Petitioner has not been arrested or charged with any crime and was not served with an indictment, either state or federal.

On September 26, 1989, Floyd Roberts appealed to the Eighth District Court of Appeals. The Appeals Court dismissed Petitioner's appeal on November 16, 1989, sua sponte, for failure to comply with Local Rule 3(B)(1) that the Appellant furnish a clerk-stamped notice of the Order.

On November 20, 1989, Petitioner filed his Motion for Reconsideration attaching an Affidavit, certified copy of the docket, and a Brief, explaining that he was unable to comply with the Local

Rule under which a copy of a time-stamped Order with a date was to be attached to the Notice of Appeal because the Order was never time-stamped and filed, and was never docketed.

On November 22, 1989, the Eighth District Court of Appeals overruled Petitioner's Motion for Reconsideration.

On December 14, 1989, Petitioner appealed to the Ohio Supreme Court.

On or about December 14, 1989, Petitioner's attorney received a letter from the Cuyahoga County Prosecutor (Exhibit A) directing the U.S. Secret Service that the Order remains in effect because the appeal was dismissed, and Petitioner's attorney then received a telephone call from the U.S. Secret Service demanding compliance with the "Order".

The Ohio Supreme Court declined to accept Petitioner's appeal on March 14, 1990.

On April 10, 1990, Petitioner's attorney received Exhibit B, a letter from the U.S. Secret Service again demanding compliance, dated April 9, 1990.

Petitioner, Floyd Roberts, herein files his Petition for Writ of Certiorari.

All issues herein have been timely and properly raised.

At the first instance, and in the Trial Court, Petitioner sought to vacate the initial Order directing him to give a handwriting exemplar by attaching his Affidavit stating that he had already complied, and the matter was moot because the U.S. Secret Service already had that which it sought.

The Trial Court overruled Petitioner's Motion without a hearing, and never directed itself to the merits of whether Petitioner had previously given the handwriting exemplar or not.

Neither Order of the Trial Court was docketed or time-stamped by the Clerk.

In the Court of Appeals, Petitioner's appeal was dismissed sua sponte, without a hearing, seemingly for the technicality of Petitioner's failure to comply with a Local Rule directing Appellant to attach a time-stamped copy of the notice being appealed from. However, the Local Rule is discretionary only and does not mandate dismissal. When Petitioner attempted to explain his inability to comply, the Court again dismissed without further comment.

The Ohio Supreme Court refused to accept Petitioner's Petition for Writ of Certiorari, again without comment.

At all stages, Petitioner attempted to appeal an Order to which he claimed he had a meritorious defense, i.e., that he had previously given a full handwriting exemplar. Yet Petitioner was unable to obtain a forum for a hearing on the merits and remains subject to a coercive Order with no mechanism for appeal, even though he has never been formally charged with a crime, his exemplar is not necessary for identification purposes because he already agrees that he was an endorser on the check, and he has no means or method to appeal that which he believes to be a violation of his Fifth Amendment rights because it clearly will be used to incriminate him.

ARGUMENT

The heart of this case is that it is unreasonable and unfair to order Petitioner to give a second time, that which the government agency already possesses, such Order being by means of undocketed, ex-parte Orders lacking finality, leaving Petitioner subject to a coercive Order and no forum to argue a meritorious defense and no mechanism by which to appeal.

It is fundamentally unfair because legal coercive force is being used to duplicate the handwriting sample the government already has in its possession, and a page of 20 signatures should be sufficient. By requiring Petitioner to sign more, the government agency appears to be attempting to force Petitioner to incriminate himself in violation of his constitutional privileges.

The legal effect of a Court order is that of an arrest because it interferes with Petitioner's freedom and subjects him to sanctions for disobedience of such Order. Yet, herein, Petitioner is without recourse to appeal because the government has not docketed its Orders and thus there is no finality.

The government herein succeeds in by-passing the protections and safeguards of requirements to show reasonableness under the Fourth Amendment. See State v. Armstead, 152 CA App 56, 262 SE.2d 233 (1979), Re: Riccardi, 337 F. Supp. 253 (DCNJ 19); Re: Grand Jury Proceedings Re: Dionisio, 442 F.2d 276 (CA 7 Ill. 1971).

The facts of the within cause, except for the fact that Floyd Roberts has not even been charged with any crime, are similar to U.S. v. Green, 282 F.

Supp. 373 (DC Ind. 1968) in which the government was denied a motion to require the accused to submit to handwriting exemplars because the government already had samples of his handwriting.

Petitioner, Floyd Roberts, had already given 20 handwriting exemplars and had thus fully satisfied a requirement for identification and for an identifying physical characteristic.

Although a handwriting exemplar used solely for identification purposes in open court by a criminal defendant has been held to be admissible, State v. Flinn, 70 App 3d 294 (1982), nowhere does the Flinn or any other Court suggest that a non-charged, non-indicted, non-arrested, non-criminal defendant has to submit to two handwriting exemplars, when he has already admitted to signing the check, and where the exemplar which he

already provided goes beyond his signature and provides specific examples of other signatures as well.

In Flinn, the defendant was already in Court and already under indictment, and the exemplar was to be used solely for identification purposes, unnecessary herein because Floyd Roberts previously admitted that he was one of the endorers of the check, and he is not under indictment.

Since Floyd Roberts admits that he signed his name, "Floyd Roberts" as an endorser on a check, and has identified himself to the U.S. Secret Service, and has furnished a 20 sample handwriting exemplar, which includes exemplars of Floyd Roberts' signing of the names of the other two endorers of the check, there is no valid "identification" reason or physical characteristic reason to

require Floyd Roberts, who has not been indicted or arrested or charged with any crime, to submit to a Court ordered handwriting exemplar regarding the same check endorsement.

The test for what is unreasonable in government conduct is not rigid. State v. Day, 190 App 3d 252 (1984) (Ct. App. Tuscaloosa County). However, the right of the people to be secure in their persons against government intrusion is guaranteed by the Fourth Amendment to the United States Constitution.

Even in the facts of the Day case, which opened up government searches, the Court still looked to see whether the government's conduct is reasonable on the facts of the case.

The question is how can we determine whether the government's conduct is reasonable when there was no hearing to

determine the facts? The answer is that we cannot. Here there was no emergency to be confronted, and a probable cause hearing could have been held easily.

The Trial Court erred, and now Floyd Roberts has no remedy herein, because a secret ex-parte Order was entered into with no Clerk's time-stamp and no date-stamp and no case number and was not docketed; thus the Order is not final for appeal purposes. Yet, the Prosecutor and the U.S. Secret Service stand ready to carry out the Order for which Petitioner, Floyd Roberts, has no recourse, see Exhibits A and B.

The record here does indeed indicate prosecutorial harassment and misuse of the judicial system in that nowhere in the record is there evidence of a need for the U.S. Secret Service to be the Court's errand boy or the Prosecutor's

server of process, and there is no case number or documentation of what went on behind the scenes in order to obtain these ex-parte Orders as there is still no federal or state criminal case or indictment.

The shadow of fear is not the arm of the law or justice, and this Honorable Court should not permit such tactics.

The case herein is also analogous to State v. Naylor, 70 O App 2d 233, 24 O Ops 3d 306 (Ct. App. Lorain County 1980) in which the Court determined that a criminal defendant is not required to repeat at trial the words used by a perpetrator of a crime for purposes of establishing an in-court identification, and is violative of the constitutional rule of fundamental fairness in trial proceedings, citing Rochin v. California, 342 US 165 (1952); Breithaupt v. Abram,

352 US 432 (1957).

The privilege against self-incrimination can supposedly be claimed in any proceeding, but the within tactics are designed to circumvent the rules of fairness. See In Re: Gault, 40 O Ops 2d 378 (U.S. Supreme Court 1967).

Herein, Petitioner, Floyd Roberts, has no recourse at all and cannot even refuse to obey the Order.

This Order affects a substantial right and since it is ex-parte, can be termed a special proceeding, yet this Order falls between the cracks and is not final for purposes of appeal. See Chef Italiano v. Kent State University, 44 OS.3d 86 (1989).

CONCLUSION

The original Trial Court exceeded its jurisdiction and engaged in harassing and intimidating tactics in issuing ex-parte Orders directing Floyd Roberts to follow the directive of the U.S. Secret Service when Floyd Roberts had not been charged with any state or federal crime and there exists no federal order, and in permitting the U.S. Secret Service to provide personal service upon Floyd Roberts of the Court's Orders, bypassing its normal service requirements, such Orders containing no case numbers and no recourse, and which Orders were undocketed and thus not appealable for lack of finality.

When Floyd Roberts, through his attorneys, filed a Motion to Vacate the first ex-parte Order with Affidavits

demonstrating a valid defense, the second Order was then served upon him personally, again, by the U.S. Secret Service at his place of business.

At no time did Floyd Roberts or his attorneys receive service of anything from the County Prosecutor or from the Court. Service was made, of the no-case-numbered documents allegedly filed, by the U.S. Secret Service. Neither Floyd Roberts nor his attorneys were shown any documents authorizing the U.S. Secret Service Agents to act for either the Common Pleas Court or the Common Pleas Criminal Prosecutor.

Furthermore, when Petitioner, Floyd Roberts' appeal was dismissed, again the chilling and harassing effect of these "Orders" remained.

This case is of great public importance because of the chilling and

coercive effect of these supposed "Orders", issued ex-parte.

This Honorable Supreme Court should take jurisdiction and review this case because of the dangerous precedent which is set by the present existing "Orders" and present inability of Petitioner, Floyd Roberts, to appeal such "Orders".

A signed Court order which compels action on the part of a defendant ordering him to give a handwriting exemplar, and which compels defendant to submit to a procedure carried out by a law enforcement agency and which subjects defendant to criminal penalties for non-compliance should be a final appealable Order when defendant claims a valid defense, i.e., that his identification is not in issue and that he has previously furnished the handwriting exemplars and that the agency thus already has that

which it is requesting.

An uncharged, unindicted defendant who has submitted one handwriting exemplar should not be compelled to submit to another identical handwriting exemplar in the absence of a full hearing or appellate ruling or criminal indictment, and such defendant should not be left without remedy and forced to submit to an Order which may not be appealed and which may be in violation of his Fourth, Fifth and Fourteenth Amendment rights.

The proceeding has reached the accusatory stage and defendant has a privilege which he should be able to assert before a Court, and he is unable to do it when coercive letters are received (See Exhibits A and B).

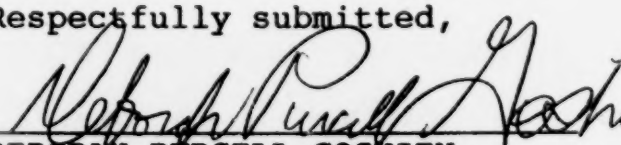
Petitioner should be able to invoke his Fourth and Fifth Amendment privileges

and have an opportunity to be heard on this issue.

This proceeding constitutes an abuse of process because an unjournalized Court entry is being used to demand submission, with the implied threat of criminal sanctions.

The law should be clarified by this Honorable Court so that due process is invoked for a defendant such that he may have a forum to appeal, and may present defenses to a second coercive Order for a handwriting exemplar.

Respectfully submitted,


DEBORAH PURCELL GOSHIEEN
Deborah Purcell Goshien Co.,
L.P.A.

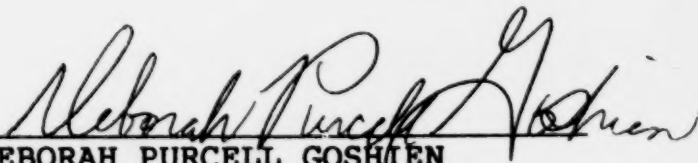
The Illuminating Bldg.
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Attorney for Petitioner

CERTIFICATE OF SERVICE

3 copies

~~A~~ copy of the foregoing was served upon John T. Corrigan and William Caine, Attorneys for the State of Ohio, Justice Center - 9th Floor, 1200 Ontario Street, Cleveland, Ohio 44113 by First Class U.S. Mail on this 8 day of June, 1990.


DEBORAH PURCELL GOSHIEEN
Attorney for Petitioner



THE SUPREME COURT OF OHIO

1990 Term

To wit: March 14, 1990

In re Floyd Roberts. :
: Case No. 90-88
: ENTRY

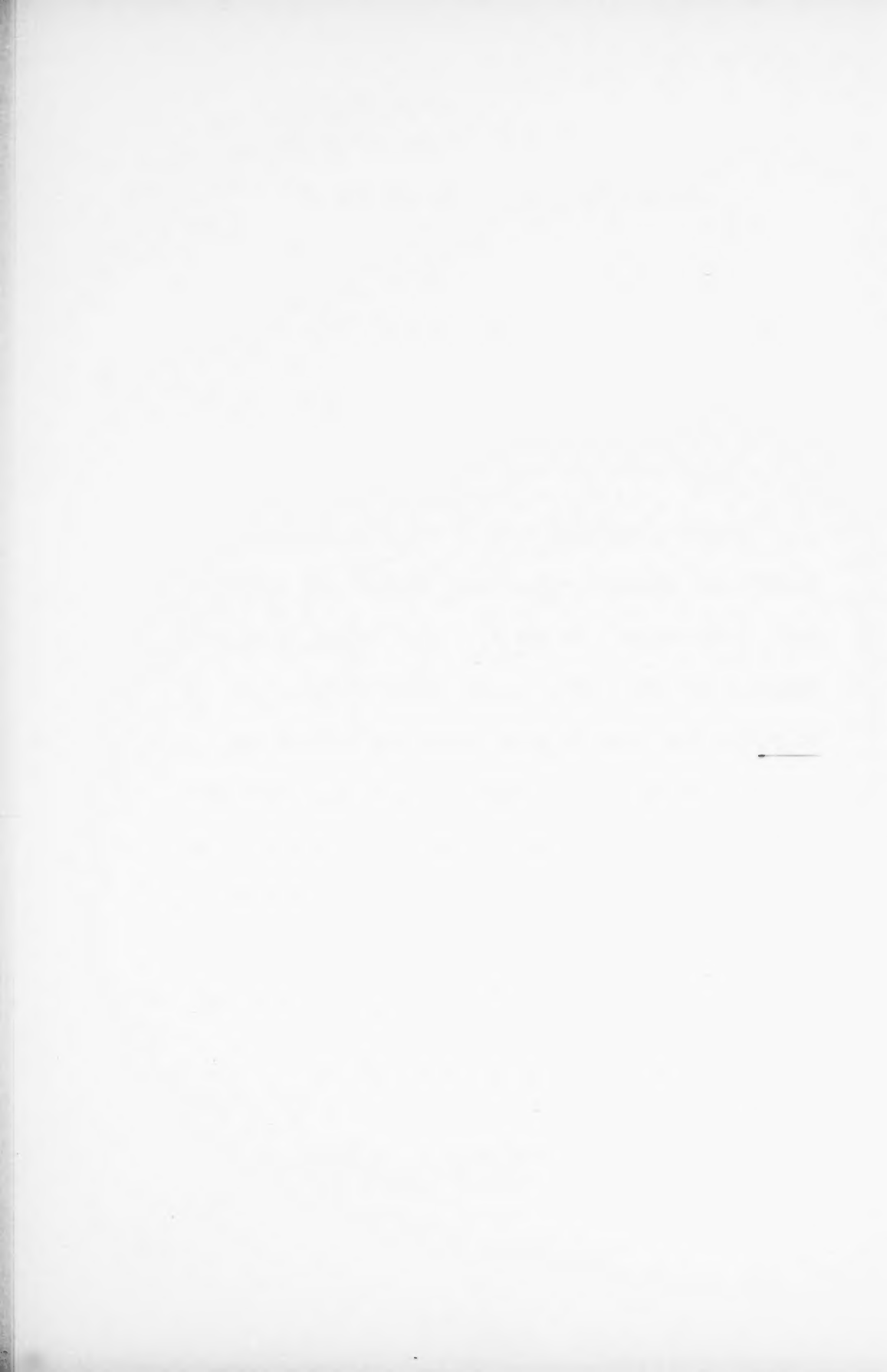
Upon consideration of the motion for leave to appeal from the Court of Appeals for Cuyahoga County, and the claimed appeal as of right from said Court, it is ordered by the Court that said motion is overruled and the appeal is dismissed sua sponte for the reason that no substantial constitutional question exists therein.

COSTS:

Motion Fee, \$40.00, paid by Deborah Purcell Goshien Co., L.P.A.

(Court of Appeals No. 58514)

/s/ THOMAS J. MOYER
Chief Justice



IN THE SUPREME COURT OF OHIO

Case No. 90-88

STATE OF OHIO

Plaintiff-Appellee

vs.

IN RE: FLOYD ROBERTS

Defendant-Appellant

APPEAL FROM THE EIGHTH DISTRICT COURT OF
APPEALS

MEMORANDUM IN SUPPORT OF CLAIMED
JURISDICTION OF SUPREME COURT

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JOHN T. CORRIGAN Filed Jan 16 1990
WILLIAM CAINE Marcia J. Mengel, Clerk
Justice Center - 9th Floor Supreme Court
1200 Ontario Street of Ohio
Cleveland, Ohio 44113
Attorneys for Plaintiff-Appellee

PROPOSITION OF LAW

An ex-parte coercive Order signed by a sitting Common Pleas Judge may be appealed by a Defendant and is a final appealable Order regardless of whether such Order has been filed with the Clerk of Court, and regardless of whether it has a case number and regardless of whether Defendant has been formally charged with a crime, if in fact the Order may force Defendant to comply without the opportunity to rebut or to defend against such Order.

90-88
IN THE COURT OF APPEALS
EIGHTH JUDICIAL DISTRICT OF OHIO
CUYAHOGA COUNTY

STATE OF OHIO

COURT OF APPEALS
CASE NO. 58514

Plaintiff-Appellee

vs.

LOWER COURT NO.
CR-244007

IN RE:

FLOYD ROBERTS

Defendant-Appellant

NOTICE OF APPEAL

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**IN THE COURT OF APPEALS
EIGHTH JUDICIAL DISTRICT OF OHIO
CUYAHOGA COUNTY**

STATE OF OHIO

**COURT OF APPEALS
CASE NO. 58514**

Plaintiff-Appellee

vs.

**LOWER COURT NO.
CR-244007**

IN RE:

**FLOYD ROBERTS Filed Court of Appeals
Dec 14 1989**

**Defendant-Appellant Gerald E. Fuerst
Clerk of Courts
Cuyahoga County, Ohio**

NOTICE OF APPEAL

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IN THE COURT OF APPEALS
EIGHTH JUDICIAL DISTRICT OF OHIO
CUYAHOGA COUNTY, OHIO

STATE OF OHIO

COURT OF APPEALS
CASE NO. 58514

Plaintiff-Appellee

vs.

LOWER COURT NO.
CR-244007

IN RE: FLOYD ROBERTS

Defendant-Appellant NOTICE OF APPEAL

Defendant-Appellant, Floyd Roberts,
hereby appeals to the Supreme Court of
Ohio, from the judgment entry of the
Eighth District Court of Appeals, dated
November 16, 1989 which sua sponte
dismissed his Appeal, and further appeals
the denial of his Motion for
Reconsideration dated November 22, 1989.

This appeal involves a substantial
Constitutional question.

/s/ Herbert L. Bernstein

/s/ Deborah Purcell Goshien
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Telephone: (216) 621-5435
Attorneys for Defendant-
Appellant, Floyd Roberts

SERVICE

A copy of the foregoing Notice of Appeal was served upon John T. Corrigan and William Caine, Attorneys for Plaintiff-Appellee State of Ohio, Justice Center - 9th Floor, 1200 Ontario Street, Cleveland, Ohio 44113 by First Class U.S. Mail on this 14 day of December, 1989.

/s/ Herbert L. Bernstein

/s/ Deborah Purcell Goshien
Attorneys for Defendant-
Appellant

CASE 58514

DATE 11/21/89

IN RE: FLOYD ROBERTS

vs

COURT OF APPEALS OF
OHIO

OHIO STATE OF

EIGHTH APPELLATE
DISTRICT

MOTION BY APPELLANT
FOR RECONSIDERATION
IS DENIED.

CUYAHOGA COUNTY
COURT HOUSE
ONE LAKESIDE AVE.
CLEVELAND, OH 44113

TO:

ANN MCMANAMON, C.J.

BERNSTEEN, HERBERT L.
THE ILLUMINATING
BLDG.

PATTON, J., CONCUR

55 PUBLIC SQ. #1325
CLEVELAND, OHIO 44113

IN THE COURT OF APPEALS
EIGHTH JUDICIAL DISTRICT OF OHIO
CUYAHOGA COUNTY

STATE OF OHIO

COURT OF APPEALS
CASE NO. 58514

Plaintiff-Appellee

vs.

LOWER COURT NO.
CR-244007

IN RE:

FLOYD ROBERTS

Filed Court of Appeals
Nov 20 1989

Defendant-Appellant Gerald E. Fuerst
Clerk of Courts
Cuyahoga County, Ohio

DEFENDANT-APPELLANT'S MOTION FOR
RECONSIDERATION

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Attorneys for Plaintiff-Appellee

IN THE COURT OF APPEALS
EIGHTH JUDICIAL DISTRICT OF OHIO
CUYAHOGA COUNTY

STATE OF OHIO

COURT OF APPEALS
CASE NO. 58514

Plaintiff-Appellee

vs.

LOWER COURT NO.
CR-244007

FLOYD ROBERTS

Defendant-Appellant DEFENDANT-
APPELLANT'S
MOTION FOR
RECONSIDERATION

Defendant-Appellant, Floyd Roberts,
respectfully moves that this Honorable
court reconsider its dismissal of
Defendant-Appellant's Appeal for failure
to comply with Local Rule 3(B), for the
reasons stated in the attached Brief,
Affidavit and certified copy of the
docket.

/s/Herbert L. Bernstein
/s/Deborah Purcell Goshien
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Attorneys for Defendant-
Appellant

SERVICE

A copy of the foregoing Motion and attached Brief, Affidavit and docket was served upon John T. Corrigan and William Caine, Attorneys for Plaintiff-Appellee State of Ohio, Justice Center - 9th Floor, 1200 Ontario Street, Cleveland, Ohio by First Class U.S. Mail on this 20 day of November, 1989.

/s/ Herbert L. Bernstein

/s/ Deborah Purcell Goshien
Attorneys for Defendant-
Appellant

BRIEF

Rule 3(B) states that the omission of judgment entries bearing the Clerk's stamp "Received for Filing" and the date of receipt by the Clerk, may be the basis for a dismissal, and that these entries are not jurisdictional. See Rule 3(B)(1). Defendant-Appellant attached copies of the Orders which were delivered to him, but such Orders did not contain the Clerk's stamp.

As set forth in the Affidavit attached hereto and the certified copy of the docket, Defendant-Appellant's attorneys have been unable to obtain such stamped copies, and these attorneys have fulfilled the requirements of the Rules to the extent that they have been capable of doing so, and this appeal should not be dismissed in view of the fact that the attachments are not jurisdictional and

moreover the Defendant-Appellant, Floyd Roberts, is subject to the coercive force of both unjournalized Orders which have been presumably signed by an authorized Judge of the Court of Common Pleas and are presumably in effect. Defendant-Appellant should be able to presume that Orders delivered to him are in fact "Orders" and that the Court will journalize its Orders within a reasonable time.

Rule 3(B)(2) sets forth that a Notice of Appeal prematurely filed before entry of Judgment shall be retained. Since the Clerk forwarded the docket entry, presumably, this Appellant has reason to believe that these Orders are in effect and that he may appeal therefrom.

In view of the fact that these are criminal case Orders and would subject

Defendant-Appellant, Floyd Roberts, to contempt proceedings and punishment including jail and/or fine and/or further Orders, it is appropriate that this appeal be permitted to continue as the attachments are not jurisdictional, and the Defendant-Appellant is subject to such Orders.

In the alternative, if this Honorable Court of Appeals declares there exists no valid Orders, then Defendant-Appellant, Floyd Roberts, should be permitted to go on his way without the coercive effects of these supposed Orders.

If the Court of Appeals determines to dismiss Defendant-Appellant's appeal as stated, then it would appear that Defendant-Appellant is subject to these Orders and is permanently barred from appealing same and Defendant-Appellant is

left with no remedy.

Defendant-Appellant, Floyd Roberts,
respectfully moves that this Honorable
Court of Appeals reconsiders its
decision.

Respectfully submitted,

/s/Herbert L. Bernstein

/s/Deborah Purcell Goshien
The Illuminating Building
Suite 1325
55 Public Square
Cleveland, Ohio 44113
Telephone: (216) 621-5435
Attorneys for Defendant-
Appellant, Floyd Roberts

STATE OF OHIO)
 SS: AFFIDAVIT OF
COUNTY OF CUYAHOGA) ANN J. SURVOY

ANN J. SURVOY, being first duly sworn according to law, deposes and says that she is employed by Attorney Deborah Purcell Goshien and in such capacity, she proceeded to the Office of the Clerk of Court on November 20, 1989, in order to obtain certified copies of the two judgments appealed from which would bear the Clerk's stamp "Received for Filing" and the date or receipt by the Clerk, pursuant to Local Rule 3(B)(1).

Affiant states that the judgment entries do not appear of record on the docket, a certified copy of which docket is attached hereto, and further states that she was informed by several employees of the Clerk's office that there is no special or other

miscellaneous docket and no other place that the judgments could appear and that she has been unable to obtain copies of the judgments bearing the Clerk's stamp "Received for Filing" with the date of receipt by the Clerk, although she has requested same.

Affiant states that the above is true.

/s/ Ann J. Survoy

Sworn to and subscribed before me, a notary public, on this 20 day of November, 1989.

/s/ Deborah Purcell Goshien
Notary Public - no
expiration

APPEARANCE AND EXECUTION CRIMINAL DOCKET

Case No. CR 244007

State of Ohio

vs.

In Re: Motion to
Vacate Order

Address Floyd Roberts

PROCEEDINGS

9-12-89 Motion to Vacate Order
for Handwriting Exemplar Filed

9-26-89 N/A, \$50.00 filing fee,
Praecipe, Docketing Statement
(accelerated), Journal Entry,
filed and sent to C of A with
copy of Docket Sheet

10-10-89
Record on Appeal

THE STATE OF OHIO)	I, GERALD E.
Cuyahoga County)SS.	FUERST, CLERK OF
	THE COURT OF
	COMMON PLEAS
	WITHIN AND FOR
	SAID COUNTY

HEREBY CERTIFY THAT THE ABOVE AND
FOREGOING IS TRULY TAKEN AND COPIED FROM
THE ORIGINAL JOURNAL NOW ON FILE IN MY
OFFICE. WITNESS MY HAND AND SEAL OF SAID
COURT THIS 20 DAY OF NOV. A.D. 1989.

By /s/ _____ Deputy
GERALD E. FUERST, CLERK

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT
COUNTY OF CUYAHOGA
GERALD E. FUERST, CLERK OF COURTS

IN RE: FLOYD ROBERTS COURT OF APPEALS
NO. 58514

APPELLANT

-vs-

OHIO STATE OF

LOWER COURT NO.
CP-CR-244007
COMMON PLEAS
COURT

APPELLEE

MOTION NO. 98049

DATE 11/16/89

JOURNAL ENTRY

THIS CASE IS DISMISSED SUA SPONTE. SEE
LOCAL APPELLATE RULE 3(B).

Received for Filing
Nov 16 1989
Gerald E. Fuerst, Clerk

PATTON, J., CONCURS

/s/ Ann McManamon
PRESIDING JUDGE
ANN MCMANAMON, C.J.

PURSUANT TO RULE 22(D) AND RULE 26, OHIO
RULES OF APPELLANT PROCEDURE, THIS
DECISION WILL BE JOURNALIZED AND WILL
BECOME THE JUDGMENT AND ORDER OF THE
COURT AND THE TIME PERIOD FOR REVIEW
WILL BEGIN TO RUN, UNLESS A MOTION FOR
RECONSIDERATION WITH SUPPORTING BRIEF IS
FILED WITHIN TEN (10) DAYS FROM THIS
ANNOUNCEMENT OF THE COURT'S DECISION.

IN THE COURT OF APPEALS
EIGHTH JUDICIAL DISTRICT OF OHIO
CUYAHOGA COUNTY

STATE OF OHIO

COURT OF APPEALS
CASE NO. 58514

Plaintiff-Appellee

vs.

LOWER COURT NO.
CR-244007

IN RE:

FLOYD ROBERTS

Filed Court of Appeals
Nov 13 1989

Defendant-Appellant Gerald E. Fuerst
Clerk of Courts
Cuyahoga County, Ohio

ASSIGNMENTS OF ERROR AND BRIEF OF
DEFENDANT-APPELLANT

HERBERT L. BERNSTEEN
DEBORAH PURCELL GOSHEN
The Illuminating Building
Suite 1325
55 Public Square
Cleveland, Ohio 44113
Telephone: (216) 621-5435

Attorneys for Defendant-
Appellant

JOHN T. CORRIGAN
WILLIAM CAINE
Justice Center - 9th Floor
1200 Ontario Street
Cleveland, Ohio 44113

Attorneys for Plaintiff-Appellee

STATEMENT OF THE ASSIGNMENTS OF ERROR
PRESENTED FOR REVIEW

1) The Court erred in overruling Defendant-Appellant's Motion to Vacate its Order requiring him to submit to handwriting exemplars when it was made known to the Court that the U.S. Secret Service already possessed the handwriting exemplar it was requesting.

2) The Court erred in failing to have a hearing prior to issuing its Order overruling Defendant-Appellant's Motion to Vacate the Court's prior Order requiring a handwriting exemplar when it was made known to the Court that Defendant-Appellant, Floyd Roberts, was not indicted, accused or arrested and that he had already given a handwriting exemplar consisting of 20 samples including specimens identical to the signatures contained in a writing

directly linked to the alleged crime.

3) The Court erred in its original Order ordering Defendant-Appellant ex-parte to submit to a handwriting exemplar on or about September 7, 1989, in the absence of an arrest, indictment or information and without first having a hearing to determine the facts and without allowing notice and confrontation of witnesses.

4) The Court exceeded its jurisdiction and engaged in harassing and intimidating tactics in issuing ex-parte Orders directing Floyd Roberts to follow the directive of the U.S. Secret Service when Floyd Roberts had not been charged with any state or federal crime and there exists no federal order, and in permitting the U.S. Secret Service to provide personal service upon Defendant-Appellant of the Court's Orders,

bypassing its normal service requirements, such Orders containing no case numbers.

IN THE COURT OF COMMON PLEAS
CRIMINAL DIVISION
CUYAHOGA COUNTY, OHIO

IN RE: FLOYD ROBERTS CASE NO. CR-244007

JUDGE WILLIAM E.
AURELIUS

NOTICE OF APPEAL

Floyd Roberts, by and through his attorneys, Herbert L. Bernstein and Deborah Purcell Goshien, hereby appeals to the Court of Appeals of Cuyahoga County, Ohio, Eighth Appellate District, from the undated Order entered on or about September 14, 1989, which denied Floyd Robert's Motion to Vacate Order entered on or about September 7, 1989, and which ordered Floyd Roberts to submit to handwriting exemplar by officers of

Filed Sep 26 4:13 PM '89
Gerald E. Fuerst
Clerk of Court
Cuyahoga County

the United States Secret Service.

/s/Herbert L. Bernstein

/s/Deborah Purcell Goshien
The Illuminating Building
Suite 1325
55 Public Square
Cleveland, Ohio 44113
Telephone: (216) 621-5435
Attorneys for Floyd Roberts

SERVICE

A copy of the foregoing Notice of Appeal was served upon John t. Corrigan and William Caine, Prosecuting Attorneys, Justice Center - 9th Floor, 1200 Ontario Street, Cleveland, Ohio 44113 by hand delivery on this 26 day of September, 1989.

/s/Herbert L. Bernstein

/s/Deborah Purcell Goshien

STATE OF OHIO
COUNTY OF CUYAHOGA

IN THE COURT OF
COMMON PLEAS
CRIMINAL DIVISION

JUDGE WILLIAM E.
AURELIUS

IN RE: FLOYD ROBERTS ORDER

After consideration of Mr. Floyd Roberts' Motion to Vacate Order and the Supplemental Affidavit filed by the Cuyahoga County Prosecutors Office and for good cause shown, the Motion to Vacate is overruled, and the September 6, 1989 order requiring Mr. Floyd Roberts to submit to a handwriting exemplar by officers of the United States Secret Service shall remain in effect.

It is so ordered.

/s/ William E. Aurelius
JUDGE, COURT OF COMMON
PLEAS, CUYAHOGA COUNTY,
OHIO

IN THE COURT OF COMMON PLEAS
CRIMINAL DIVISION
CUYAHOGA COUNTY, OHIO

IN RE: FLOYD ROBERTS CASE NO. CR-244007

JUDGE WILLIAM E.
AURELIUS

SEP 12 2:44PM '89
GERALD E. FUERST
CLERK OF COURTS

MOTION TO VACATE
ORDER

Floyd Roberts, by and through his Attorneys, Herbert L. Bernstein and Deborah Purcell Goshien, moves that the within Order to submit handwriting exemplar be vacate, for the Order is moot, as per reasons stated in the attached Affidavit and Brief.

Respectfully submitted,

/s/Herbert L. Bernstein

/s/Deborah Purcell Goshien
The Illuminating Bldg.
Suite 1325
55 Public Square
Cleveland, Ohio 44113
Telephone: (216) 621-5435
Attorneys for Floyd Roberts

SERVICE

A copy of the foregoing Motion to Vacate Order was served upon John T. Corrigan, County Prosecutor, Justice Center, Cleveland, Ohio and Michael Dobeck, United States Secret Service, 6100 Rockside Woods Boulevard, Cleveland, Ohio 44131 by First Class U.S. Mail on this 12 day of September, 1989.

/s/Herbert L. Bernstein

/s/Deborah Purcell Goshien
Attorneys for Floyd Roberts

BRIEF

That United States Secret Service, with no notice to counsel, of whom it was aware and with whom it had met September 6, 1989, apparently moved the Court to order a handwriting sample without apprising the Court that Floyd Roberts had already voluntarily submitted 20 handwriting samples at the behest of and in the presence of and at the direction of Officer Dobeck, as per the Affidavit attached hereto and made a part hereof.

Having complied, the Order is moot and Floyd Roberts moves that it be vacated, as it was requested without notice to Floyd Roberts, without notice to his counsel, and without informing the Court that Floyd Roberts had already complied, and with prior notice that Floyd Roberts was and is represented by

counsel.

Respectfully submitted,

/s/Kerbert L. Bernstein

/s/Deborah Purcell Goshien
Attorneys for Floyd Roberts

State of Ohio
Cuyahoga County

Affidavit of Floyd
Roberts

Floyd Roberts being first duly sworn according to law, deposes and says:

That the above order is moot, as affiant has complied, and this affiant has voluntarily and without representation by counsel furnished a complete handwriting exemplar to Special Agent Michael Dobeck on or about August 28, 1989, at which time he furnished approximately 20 samples of his handwriting, completing the entire form, and then Agent Dobeck put it away in his brief case.

Affiant, having fully complied, should not be forced to co-operate with a fishing expedition by the United States Secret Service, as punishment for this affiant wishing to be represented by

counsel in further proceedings. Furthermore, the Secret Service is well aware of counsel's representation because counsel appeared at the Secret Service office to give an oral statement on September 6, 1989 when this Affiant again appeared voluntarily to discuss the matter. Affiant respectfully suggests that the Secret Service is attempting to entrap this affiant, and that the 20 samples of his handwriting is sufficient to satisfy the order.

Affiant respectfully urges that this Honorable Court vacate the within order as it is moot, this affiant having previously complied.

Affiant says that the above is true.

/s/Floyd Roberts

Sworn to and subscribed before me, a notary public, on this 11th day of

September, 1989.

/s/Deborah Purcell Goshien

Notary Public - no expiration

STATE OF OHIO)
COUNTY OF CUYAHOGA)

SS: AFFIDAVIT OF
DEBORAH PURCELL
GOSHIE

DEBORAH PURCELL GOSHIE, being first duly sworn according to law, deposes and says that she is one of the attorneys for Floyd Roberts.

On or about December 14, 1989, she received a letter from the Cuyahoga County Prosecutor, a copy of which is attached hereto and made a part hereof as Exhibit A, and she also received a telephone call from the U.S. Secret Service Agent Michael Dobeck demanding that Defendant Floyd Roberts submit to another handwriting exemplar as per Judge Aurelius' Order.

/s/Deborah Purcell Goshie
Sworn to and subscribed before me, a notary public, on this 15 day of

December, 1989.

/s/Ann J. Survoy
Notary Public
my commission expires
December 8, 1992

County of
Cuyahoga

John T. Corrigan
Prosecuting Attorney
December 11, 1989

Michael Dobeck, Special Agent
United States Secret Service
6100 Rockside Wood Boulevard
Independence, Ohio 44131

Re: Floyd Roberts

Dear Mr. Dobeck:

Please be advised that the Court of Appeals has overruled Floyd Robert's Motion for Reconsideration. Therefore, please be advised that you may contact counsel for Mr. Roberts at your convenience to make arrangements for him to complete the handwriting exemplar.

Thank you for your attention to this matter.

Sincerely,

JOHN T. CORRIGAN
Prosecuting Attorney
Cuyahoga County, Ohio

/s/William R. Caine

By: William R. Caine
Assistant Prosecuting
Attorney

STATE OF OHIO) IN THE COURT OF
) COMMON PLEAS
COUNTY OF CUYAHOGA) CRIMINAL DIVISION

IN RE: FLOYD ROBERTS ORDER

 This matter came on to be heard upon the written motion and brief of the Cuyahoga County Prosecuting Attorney and made at the request of the office of the Prosecuting Attorney and the Court for good cause shown makes the following order:

 That Floyd Roberts furnish a handwriting exemplar to be administered under the direction and control of Special Agent Michael Dobeck of the United States Secret Service or other members of said agency. This said exemplar than shall be conveyed by the Secret service to their authorized handwriting analyst.

 That said exemplar shall be taken forthwith at the earliest convenience of

Floyd Roberts.

DATED: This 7th day of September, 1989.

/s/ William E. Aurelius
JUDGE, COURT OF COMMON
PLEAS, CUYAHOGA COUNTY,
OHIO

RULE 3. COSTS DEPOSITS; APPEAL OF RIGHT

(A) Costs Deposits. No notice of appeal will be accepted for filing in the Court unless the party bringing the action first deposits with the Clerk of Courts the sum of \$50 as security for the payment of costs. If the appellant either files with the Clerk a sworn affidavit or affirmation of inability to secure costs by prepayment, or produces evidence that the trial court determined that the appellant was indigent for purposes of appeal, the Clerk shall receive and file the appeal without security deposits.

(B) Appeal of Right.

1. The notice of appeal shall have attached to it a copy of the judgment or order appealed from (journal entry)

signed by the trial judge and bearing the clerk's stamp "Received for filing" with the date of receipt by the clerk. The subject attachments are not jurisdictional but their omission may be the basis for a dismissal.

2. Pursuant to Appellate Rule 4, a notice of appeal prematurely filed before actual entry of the judgment or order from which appeal is taken shall be treated as filed after such entry and on the same day. When a notice of appeal is so prematurely filed, it shall be retained by the clerk of the trial court and a copy, together with a copy of the docket entries, shall not be forwarded to the clerk of this court pursuant to Appellate Rule 3(D) until after such entry. If a motion for a new trial or non obstante veredicto is pending when a notice of appeal is filed, appellant

shall indicate the filing date of the motion on the praecipe (see Civ.R. 50(B) and 59; CrR 33 and 34).

3. A separate notice of appeal shall be filed in the trial court for each case appealed whether or not the cases have been consolidated.

The appeals shall be separately docketed by the clerk of this court assigning a separate appeal number for each case determined by the trial court whether by separate or joint judgment entries and whether a separate or joint notice of appeal has been filed.

Immediately upon filing the notices of appeal, the appellant shall file a motion in this court requesting consolidation of the appeals, and the filing of a joint transcript of proceedings and joint briefs, where the cases were consolidated in the trial.

court, and consolidation upon appeal is also appropriate. If appellant fails to do so, the appellee may file a motion for consolidation, or the court may sua sponte order consolidation of the appeals.

4. Counsel, or litigants filing notices of appeal in their own behalf, must include current names and addresses for counsel of record for appellees with sufficient copies for service on all counsel. In the event an appellee is unrepresented, then the appellee's current address and a copy for service on that appellee must be provided.

[Amended January 1, 1978; June 1, 1980.]

Department of the Treasury
United States Secret Service

Rm. 440
6100 Rockside Woods Blvd.
Independence, Ohio 44131-2334
Tel.: 216/522-4365

203-750-36496

April 9, 1990

Herbert L. Bernstein
Deborah Purcell Goshien
Attorneys at Law
The Illuminating Bldg.
Suite 1325
55 Public Square
Cleveland, Ohio 44113

Dear Attorney Goshien:

The Ohio Supreme Court has dismissed the appeal of Floyd Roberts to surrender handwriting specimens to this Agency.

Special Agent Michael Dobeck would appreciate a confirmation on one of the following dates for Mr. Roberts to be available at this office by 10:00AM, to complete handwriting exemplars:

Exhibit A

Monday, April 16th
Tuesday, April 17th
or
Friday, April 20th

Please respond by Thursday, April 12,
1990.

Your anticipated cooperation is
appreciated.

Very truly yours,

/s/Rafael A. Calzada

Rafael A. Calzada
Special Agent in Charge

cc: Assistant County Prosecutor
William Caine

Exhibit A

BERNSTEEN & BERNSTEEN
Attorneys & Counselors at Law
55 Public Square * Suite 1325
Cleveland, Ohio 44113-2001
(216) 621-1865
Fax (216) 621-4192

HERBERT L. BERNSTEEN
DEBORAH PURCELL GOSHIEEN

April 11, 1990

Department of the Treasury
United States Secret Service
Room 440
6100 Rockside Woods Boulevard
Independence, Ohio 44131-2334

Attn: Mr. Rafael A. Calzada
Special Agent in Charge

Re: State of Ohio
vs. Floyd Roberts

Dear Mr. Calzada:

In response to your letter dated April 9, 1990, and received by us on April 10, 1990, please be advised that we are proceeding to appeal this matter to the United States Supreme Court.

Sincerely,

/s/Deborah Purcell Goshien

Exhibit B

DPG/ajs

Certified Mail #P 311 389 980

cc: William Caine, Assistant County
Prosecutor

Exhibit B

No. 89-1963

Supreme Court, U.S.
FILED

JUL 11 1990

JOSEPH F. SPANIOLO, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1989

FLOYD ROBERTS,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

**ON PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF OHIO**

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOHN T. CORRIGAN
Counsel of Record
Prosecuting Attorney of
Cuyahoga County, Ohio
The Justice Center
1200 Ontario Street
Cleveland, Ohio 44113
(216) 443-7746
Attorney for Respondent

GEORGE J. SADD
Assistant Prosecuting Attorney

COUNTER QUESTION OF LAW

Respondent submits that the first question presented by the record in this case is more aptly stated as follows:

1. Whether a suspect who has not been charged with any crime and who has previously provided an incomplete handwriting exemplar to officers of the United States Secret Service, should be required to complete the partial exemplar.



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TABLE OF AUTHORITIES

Cases:

<i>Gilbert v. California</i> (1967), 388 U.S. 253 at 262	4
<i>Holt v. United States</i> (1910), 218 U.S. 245	4
<i>State v. Heston</i> (1972), 29 Ohio St. 2d 152	4
<i>State v. Kiser</i> (1969), 13 Ohio St. 2d 126.	4
<i>State v. Ostrowski</i> (1972), 30 Ohio St. 2d 34	4
<i>U.S. v. Dionisio</i> (1973), 410 U.S. 1	4
<i>U.S. v. Green</i> , 282 F. Supp. 373 (D.C. Inc., 1968)	6

No. 89-1963

IN THE

Supreme Court of the United States

October Term, 1989

FLOYD ROBERTS,
Petitioner,

vs.

STATE OF OHIO,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF OHIO

**BRIEF IN OPPOSITION TO PETITION
FOR A WRIT OF CERTIORARI**

TO: The Honorable, the Chief Justice and the
Associate Justices of the Supreme Court of the United
States:

OBJECTIONS TO JURISDICTIONS

There are no substantial federal questions involved
which would require this Court to review this case.

Further, the issuance of an order granting a
handwriting exemplar is not a final appealable order.
State ex rel. Celebrezze v. Pearson (Fifth District,
October 25, 1989) C.A. No. 927 and *Union Oil Company
of California v. Hertel* (1980), 89 Ill. App. 3d 383, 411
N.E. 2d 1006.

STATEMENT OF THE CASE

On September 7, 1989, upon written motion of the Prosecuting Attorney's office (attached as Exhibit "A"), the trial court granted a motion ordering petitioner to submit to a handwriting exemplar. Motions of this type are routinely granted on request of a law enforcement agency to determine whether charges should be brought. It should be noted that no charges had been nor have been filed against petitioner. The request for this handwriting exemplar was made by the United States Secret Service in furtherance of an investigation being conducted by that agency.

Petitioner filed a Motion to Vacate the Order, stating that the petitioner had already given approximately twenty (20) handwriting samples. Further, petitioner claims that there is no issue of identification in that he has admitted signing the check in question. In response, the Prosecuting Attorney's office filed a Supplemental Affidavit of the agent with the U.S. Secret Service conducting this investigation (attached as Exhibit "B"). In essence, the affidavit stated that the exemplar was an incomplete sample, as the agent was interrupted from the exemplar session on an emergency. On the issue of identification, the Secret Service had no question that petitioner signed his own name to the forged check. It was the signature of the co-payee that is believed to have been forged by petitioner.

The court overruled petitioner's Motion to Vacate and ordered into effect its original entry granting the exemplar request.

As this was still only in its investigation phase and no case against petitioner was pending, no case number was assigned to the trial court's order.

The petitioner obtained a special case number from the Clerk of Courts and appealed the order to the Eighth District Court of Appeals. The appellate court, *sua sponte*, dismissed the appeal and subsequently overruled petitioner's Motion for Reconsideration.

The matter was appealed to the Supreme Court of Ohio where that court refused jurisdiction. The petitioner now seeks a writ of certiorari from the United States Supreme Court.

In the meantime, the Secret Service has been unable to obtain sufficient handwriting exemplars to submit to its forensic experts and petitioner's delay tactics have effectively brought their investigation to an impasse.

REASONS FOR DENYING THE WRIT

1. A suspect who has not been charged with any crime and who has previously provided an incomplete handwriting exemplar to officers of the United States Secret Service should be required to complete the partial exemplar.

Petitioner contends that it is "unreasonable and unfair" to order him to give a handwriting exemplar. Petitioner contends that since a partial sample was given by him, he should not be ordered to submit to additional exemplars.

Petitioner's true objection lies with the nature of this order—a handwriting exemplar. It has long been recognized that certain acts conducted by law enforcement authorities do not constitute testimonial compulsion in derogation of a citizen's constitutional rights. Such acts are generally termed non-testimonial evidence. Non-testimonial evidence may be defined, generally, as any evidence taken from the person of a suspect which does not involve his comment on his own guilt. The most common non-testimonial evidence includes fingerprints, blood samples, hair samples, voice samples and handwriting exemplars. This rule of law was first espoused in *Holt v. United States*, (1910), 218 U.S. 245. The subject of handwriting exemplars and the privilege against self-incrimination was addressed by the United States Supreme Court in *Gilbert v. California* (1967), 388 U.S. 253 at 262. See also *U.S. v. Dionisio* (1973), 410 U.S. 1.

The Ohio Courts leave no doubt that handwriting exemplars are permitted in criminal investigations, even when obtained by ex parte motions. *State v. Kiser* (1969), 13 Ohio St. 2d 126; *State v. Heston* (1972), 29 Ohio St. 2d 152; and *State v. Ostrowski* (1972), 30 Ohio St. 2d 34.

Having realized the enormous body of authority recognizing the validity of handwriting exemplars, petitioner now indicates that the request for exemplars was "unfair and unreasonable." Citing no authority requiring it, the petitioner states that the Secret Service made no showing of probable cause in requesting the exemplar. Obviously, a showing of probable cause (to a Grand Jury) would be required to obtain an indictment against the petitioner. However, the Secret Service is not yet in a position to present evidence to a Grand Jury without adequate handwriting exemplars for expert analysis. The law enforcement agency has in fact acted reasonably here, indicating to the trial court, by affidavit, that due to an emergency, they were unable to complete the handwriting sample and were in need of additional exemplars. Further, letters were exchanged between counsel for the petitioner and the prosecuting authorities noting the disposition of the appellate review and rerequesting an appointment for the completion of the sample (See Exhibits A and B in petitioner's Petition for Writ.)

Just as there is a likelihood that petitioner will be implicated by the handwriting samples, there is at least an equal likelihood that the samples will exonerate him. The point is that without the samples the Secret Service is unable to proceed to a Grand Jury for even a showing of probable cause. In the event the samples implicate the petitioner, he is fully entitled to all of the due process protections of any criminal defendant, *i.e.*, preliminary hearings, bill of particulars, discovery and a trial on the merits; and there is no unreasonable burden placed on petitioner in requesting that he give a complete writing sample.

In light of this, there is no showing by petitioner of any "unfair or unreasonable" due process violation.

Petitioner places reliance on *U.S. v. Green*, 282 F. Supp. 373 (D.C. Inc., 1968). This reliance is misplaced because the law enforcement agency in the case at bar does not have a *complete* sample. In that this is merely in the investigatory stages, a complete sample would only enable the law enforcement agency to determine the extent of petitioner's involvement, if any, in criminal activity.

There certainly is a need for law enforcement officials to have the ability to fully investigate criminal activity. With insufficient exemplars, the Secret Service is hamstrung and unable to proceed with its investigation. The constitutional question well settled, the Secret Service seeks only to complete its investigation free of dilatory and judicially abusive tactics on the part of petitioner's counsel.

CONCLUSION

The issue presented for review is not a final appealable order. If, however, the issue is deemed to be appealable, there is no constitutional question in that handwriting exemplars are recognized and routinely granted, and that the law enforcement agency seeking same acted fairly and reasonable.

Accordingly, petitioner's Writ for Certiorari should be denied.

Respectfully submitted,

JOHN T. CORRIGAN,
Counsel of Record
The Justice Center
1200 Ontario Street
Cleveland, Ohio 44113
(216) 4431-7746

GEORGE J. SADD
Assistant Prosecuting Attorney
The Justice Center
1200 Ontario Street
Cleveland, Ohio 44113

Attorneys for Respondent



A1

**APPENDIX
EXHIBIT "A"**

**MOTION FOR HANWRITING EXEMPLAR
IN THE COURT OF COMMON PLEAS
CRIMINAL DIVISION**

**STATE OF OHIO
COUNTY OF CUYAHOGA
IN RE: FLOYD ROBERTS**

Now comes the Prosecuting Attorney on behalf of the People of the State of Ohio and respectfully moves this Honorable Court to order Floyd Roberts to submit a handwriting exemplar for the reasons set forth and more fully developed in the brief attached hereto and made a part thereof.

**JOHN T. CORRIGAN,
Prosecuting Attorney
BY: WILLIAM R. CAINE
William R. Caine
Assistant Prosecuting Attorney
1200 Ontario Street
Cleveland, Ohio 44113**

BRIEF

It has been brought to the attention of the Cuyahoga County Prosecuting Attorney's Office that Special Agent Michael Dobeck of the United States Secret Service has been investigating a check forgery involved a United States warrant. Some of the writing on that warrant may have been by Floyd Roberts (D.O.B. 05/09/37, S.S. #233-62-6173) and to further investigate these writings, a handwriting exemplar is necessary.

Therefore, in order to further investigate the illegal forged warrant in the interest of justice, we respectfully request this Honorable Court to order Floyd Roberts to submit a handwriting exemplar.

Certain acts conducted by law enforcement authorities do not constitute testimonial compulsion in derogation of a citizen's Fifth Amendment rights. Such acts are generally termed non-testimonial evidence taken from the person of suspect which does not involve his comment on his own guilt. The most common non-testimonial evidence includes fingerprints, photographs, blood samples, voice prints and handwriting samples. The subject of handwriting exemplars and the privilege against self-incrimination was addressed by the Supreme Court in *Gilbert vs. California* (1967), 388 U.S. 253, at page 267. The Supreme Court in *Gilbert* held that, a "mere handwriting exemplar, in contrast to the content of what is written like the voice or body itself, is an identifying physical characteristic outside its protection, i.e., the protection afforded by the Fifth Amendment." See also *U.S. v. Dionisio* (1973), 410 U.S. 1.

Ohio Case law on the obtaining of a handwriting exemplar clearly permits the same. *State v. Kiser* (1969, 13 Ohio St. 2d 126; *State v. Heston* (1972) 29 Ohio St. 2nd 152; *State v. Ostrowski* (1972), 30 Ohio St. 2d 34.

For reasons stated above, the People of the State of Ohio respectfully request that this Honorable Court grant the above motion.

Respectfully submitted,
BY: WILLIAM R. CAINE
William R. Caine
Assistant Prosecuting Attorney

IN THE COURT OF COMMON PLEAS
CRIMINAL DIVISION

STATE OF OHIO
COUNTY OF CUYAHOGA

IN RE: FLOYD ROBERTS

ORDER

This matter came on to be heard upon the written motion and brief of the Cuyahoga County Prosecuting Attorney and made at the request of the office of the Prosecuting Attorney and the Court for good cause shown makes the following order:

That Floyd Roberts furnish a handwriting exemplar to be administered under the direction and control of Special Agent Michael Dobeck of the United States Secret Service or other members of said agency. This said exemplar than shall be conveyed by the Secret Service to their authorized handwriting analyst.

That said exemplar shall be taken forthwith at the earliest convenience of Floyd Roberts.

DATED: This 7th day of September, 1989.

WILLIAM E. AURELIUS
JUDGE, COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

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EXHIBIT "B"

SUPPLEMENTAL AFFIDAVIT

**IN THE COURT OF COMMON PLEAS
CRIMINAL DIVISION**

JUDGE WILLIAM E. AURELIUS

**STATE OF OHIO
COUNTY OF CUYAHOGA**

IN RE: FLOYD ROBERTS

Now comes the Office of the Prosecuting Attorney of Cuyahoga County, Ohio, and respectfully submits the attached and incorporated Affidavit in Support of the court order dated September 6, 1989 requiring FLOYD Roberts to submit to a handwriting exemplar by officers of the United States Secret Service.

Wherefore, the State prays that Mr. Roberts' Motion to Vacate the September 6, 1989 Court order be denied, and that this court order be carried into effect.

Respectfully submitted,

JOHN T. CORRIGAN,
Prosecuting Attorney
Cuyahoga County, Ohio

BY: WILLIAM R. CAINE
William Caine
Assistant Prosecuting Attorney
Justice Center—9th Floor
1200 Ontario Street
Cleveland, Ohio 44113.

SERVICE

A Copy of the foregoing Supplemental Affidavit was served upon counsel for Floyd Roberts, Herbert L. Bernstein and Deborah Purcell Goshien, The Illuminating Building, Suite 1325, 55 Public Square, Cleveland, Ohio 44113, by ordinary United States mail this _____ day of September, 1989.

WILLIAM R. CAINE
William Caine
Assistant Prosecuting Attorney

EXHIBIT A

STATE OF OHIO
COUNTY OF CUYAHOGA

AFFIDAVIT

Now comes the Affiant, Michael J. Dobeck, being of lawful age and sound mind and memory, and being first duly sworn deposes and states as follows:

1. That he is a duly commissioned agent in the United States Secret Service, presently assigned to the Cleveland, Ohio field office.

2. That he is presently investigating the forgery of United States warrant.

3. That in furtherance of the investigation, he has deemed it necessary to obtain handwriting exemplar from a one Floyd Roberts.

4. That he is fact met with Mr. Roberts on or about the 29th day of August, 1989 and did in fact obtain a partial handwriting sample.

5. That he and his partner, Special Agent Dave Robie, were called away from this interview of August 29, 1989 on an emergency call, and were unable to complete the handwriting exemplar of Mr. Roberts.

6. That pursuant to Secret Service guidelines, the partial sample obtained is insufficient for their forensic experts to compare.

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7. That the complete handwriting exemplar of Mr. Roberts is necessary to complete this investigation.

Further affiant sayeth naught.

MICHAEL J. DOBECK

Special Agent

United States Secret Service

Sworn to and subscribed in my presence this
_____ of September, 1989.

NOTARY PUBLIC

IN THE COURT OF COMMON PLEAS
CRIMINAL DIVISION
JUDGE WILLIAM E. AURELIUS

STATE OF OHIO
COUNTY OF CUYAHOGA
IN RE: FLOYD ROBERTS

ORDER

After consideration of Mr. Floyd Roberts' Motion to Vacate Order and the Supplemental Affidavit filed by the Cuyahoga County Prosecutors Office and for good cause shown, the Motion to Vacate is overruled, and the September 6, 1989 order requiring Mr. Floyd Roberts to submit to a handwriting exemplar by officers of the United States Secret Service shall remain in effect.

It is so ordered.

JUDGE, COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

EXHIBIT "C"

STATE, ex rel. CELEBREZZE, Plaintiff-Appellee
v. DAVID K. PEARSON, JR., et al.,
Defendant-Appellant

State ex rel. Celebrezze v. Pearson

1989 Ohio App. LEXIS 414

Case No. CA-927; THE LEXIS PAGINATION OF
THIS DOCUMENT IS SUBJECT TO CHANGE
PENDING RELEASE OF THE FINAL PUBLISHED
VERSION.

October 25, 1989, Decided

[*1]

Court of Appeals of Ohio, Fifth Appellate District,
Ashland County

STATEMENT:

CHARACTER OF PROCEEDINGS: Civil Appeal
from Common Pleas Court, Case No. 33780.

SMART

OPINION

IRENE B. SMART, J.

This is an appeal from a judgment of the Court of
Common Pleas of Ashland County, Ohio, that ordered
defendant-appellant David Pearson, Jr. to comply with a
discovery order. Specifically, he was ordered to attend
the deposition and to provide a handwriting exemplar to
plaintiff-appellee State of Ohio.

We find that we have no jurisdiction to review this
judgment because it is not a final appealable order,
State, ex rel, Benton's Village Service v. Usher (1973), 34
Ohio St.2d 55; Klein v. Bendix Westinghouse (1968), 13
Ohio St.2d 85.

The appeal is dismissed, and the cause is remanded to the trial court for further proceedings in accord with applicable law.

JUDGMENT ENTRY

For the reasons stated in the Memorandum-Opinion on file, this appeal is dismissed, and the cause is remanded to the trial court for further proceedings in accord with applicable law.

JUDGMENT: Dismissed

Hon. Irene B. Smart, J., Hon. Norman J. Putman, P.J., Hon. W. Scott Gwin, J. concur.

For Plaintiff-Appellee: ANTHONY J. CELEBREEZZE, [*2] Attorney General, DIANNE GOSS PAYNTER, Chief, Consumer Protection, TED BARROWS, Assistant Attorney General, Columbus, Ohio.

For Defendant-Appellant: LAW FIRM OF GARY PAUL PRICE, GARY PAUL PRICE, Columbus, Ohio.